EFFECT OF THE EIGHTEENTH AMENDMENT ON PRIOR EXISTING STATE LEGISLATION. — Among the problems left undecided when the Supreme Court of the United States sustained the validity of the Eighteenth Amendment [1] and with it the constitutionality of the National Prohibition Act,[2] was the construction to be given two phrases of section two of the Amendment: first, what is meant by the "concurrent power" [3] of the federal and state governments to enforce the Amendment; and, second, what is "appropriate" [4] state legislation for its enforcement? The court did declare that the concurrent power is not joint, nor is it such a division as exists between interstate and intrastate commerce.[5] But it left its conception thereof to be gathered from the concurring opinion of the Chief Justice,[6] which intimated that Congress had the duty of enacting legislation which should be operative throughout the country, but that each state could act as it saw fit within its jurisdiction as long as such acts contemplated enforcement of the Amendment and were consistent with the federal statutes. Such will be assumed to be the meaning and effect of the phrase "concurrent power." [7]

From this it would follow that appropriate state legislation for the enforcement of the Amendment must be such as coincides, or at least does not conflict, with the federal statute, *i. e.*, the Volstead Act. But for practical purposes the real question, which is raised in the two recent cases of *Commonwealth* v. *Nickerson* [8] and *Ex parte Ramsey*,[9] is whether state legislation enacted prior to the ratification of the Amendment can come within the definition of "appropriate," and, if so, how far such statutes remain in force. To determine this we must look at the nature of the states' power under the Amendment.

Before the Eighteenth Amendment became a part of the Constitution, the regulation of intoxicating liquors, apart from questions of interstate commerce, was exclusively exercised by the states under their general police power.[10] The Amendment, as qualified by section two, affected this power in one of two ways: it operated either (I) as a cession of all their power by the states and a recession of a restricted power; or (II) as a cession of most of their previous power with a reservation of a restricted power.

I. If it had not been for the express power conferred upon the states by section two, the Amendment would clearly be enforceable by Congress alone.[11] No state prior to the ratification of this Amendment had the

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[1] Rhode Island *v.* Palmer, 40 Sup. Ct. Rep. 486 (1920).

[2] Volstead Act, 41 STAT. AT L. 305.

[3] The second section of the Eighteenth Amendment reads as follows: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

[4] See note 3, *supra*.

[5] Rhode Island *v.* Palmer, *supra*, eighth conclusion.

[6] *Ibid.*, 488.

[7] See 33 HARV. L. REV. 968.

[8] 128 N. E. 273 (1920). See RECENT CASES, p. 328, *infra*.

[9] 265 Fed. 950 (1920). See RECENT CASES, p. 328, *infra*.

[10] Mugler *v.* Kansas, 123 U. S. 623 (1887); see License Cases, 5 How. (U. S.) 504 (1847); *In re* Rahrer, 140 U. S. 545 (1891).

[11] See concurring opinion of White, C. J., in Rhode Island *v.* Palmer, *supra*, 490.

right to enforce such a constitutional provision. Under this interpretation, therefore, the effect of section two was to give the states a power they did not have before.[12] But if the complete power to regulate liquor passed over to Congress, then the validity of all legislation enacted under it lapsed with it; and though in a twinkling a new power was revested in the states under which portions of the prior existing legislation might have been held good, yet this new power cannot revive defunct statutes. The Supreme Court has held that where a state liquor law was invalid in so far as it affected imported liquors, when Congress expressly allowed such liquors to fall under state regulation, the state law became operative without re-enactment.[13] But in that case no new power was granted, and the court expressly excluded the present situation with the statement that "this is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress." [14] It is, therefore, hard to see how this theory can have any other effect than to make all state legislation prior to the Eighteenth Amendment void. But the theory does not seem tenable. To say that the states in the same breath granted away a complete power and then regranted a part of it back to themselves is to talk in circles. Yet in no other way could this power be regranted; Congress certainly could not grant a constitutional power to the states under our theory of government.

II. The federal government is one of delegated powers.[15] "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people." [16] True, the states never had the right to enforce the Amendment before. But they had the power to prohibit the manufacture, sale, etc., of intoxicating liquors; in other words, to do exactly what the Amendment orders shall be done.[17] In ratifying the Amendment they agreed to exercise this power exclusively for the enforcement of prohibition. If this be so, it would follow that the state laws in existence prior to the ratification of the Eighteenth Amendment were based upon a power which still exists, and are consequently valid if they do not conflict with the purpose of section one of the Amendment or the Volstead Act.[18]

Assuming the second interpretation to be correct, the question still remains, whether prior state legislation which partially conflicts with the Amendment must be discarded altogether or only *pro tanto*. It is a well-established principle that a statute may be unconstitutional in part and yet valid as to the remainder, if the valid and void parts are

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[12] *Ibid.*, 490, White, C. J., said: "I assume that it will not be denied that the effect of the grant was to confer upon both Congress and the states power to do things which otherwise there would be no right to do."

[13] *In re* Rahrer, *supra*.

[14] *Ibid.*, 565.

[15] See United States *v.* Cruikshank, 92 U. S. 542, 551 (1875).

[16] UNITED STATES CONSTITUTION, Tenth Amendment.

[17] See note 10, *supra*.

[18] Rhode Island *v.* Palmer, *supra*, sixth conclusion.

separable.[19] But if to give effect to so much as is valid would bring about a result not desired or contemplated by the legislature, the whole law will be held unconstitutional.[20] This rule applies where the legislation is enacted in the light of an existing constitutional provision. But where, as in the present case, legislation perfectly valid when passed is affected by a subsequent change in the organic law, the situation is governed by the further principle that an addition to the fundamental law only repeals such prior constitutional provisions and statutes as are in conflict with it, in whole or in part.[21] On this basis all such portions of prior existing state legislation as contemplate the enforcement of prohibition remain in force, and are appropriate legislation under the terms of the Amendment.[22]

SHOULD IMPOSSIBILITY CAUSED BY A CHANGE IN FOREIGN LAW BE AN EXCUSE FOR THE NON-PERFORMANCE OF A CONTRACT? — It has been commonly held that impossibility caused by a change in foreign law is no excuse for the non-performance of a contract.[1] This is in accordance with the original common-law theory that impossibility is never an excuse for an express undertaking.[2] By modern law, however, there are several exceptions to this strict doctrine, among them one, now well established, where the subject matter or the stipulated means of performance are destroyed.[3] A further exception is often made where the means of performance that fail have been, in the contemplation of the parties, the only means available, even though not expressly con-

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[19] Presser *v.* Illinois, 116 U. S. 252 (1885); Fisher *v.* McGirr, 1 Gray (Mass.), 1 (1854); August Busch & Co. *v.* Webb, 122 Fed. 655 (1903).

[20] For cases where the unconstitutionality of part of a statute affected the validity of the whole, see Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540 (1902); Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601 (1895); Commonwealth *v.* Hana, 195 Mass. 262 (1907); Warren *v.* Mayor & Aldermen of Charlestown, 2 Gray (Mass.), 84 (1854).

For cases where the court held that the valid part of a statute was enforceable apart from the void part, see Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611 (1903); Lawton *v.* Steele, 119 N. Y. 226 (1890); State *v.* Davis, 72 N. J. L. 345 (1905).

[21] Griebel *v.* State, 111 Ind. 369, 12 N. E. 700 (1887); State *v.* Schluer, 59 Ore. 18, 115 Pac. 1057 (1911); Kansas City, Fort Scott & Memphis Railroad Co. *v.* Thornton, 152 Mo. 570 (1899).

In Trustees of University of North Carolina *v.* McIver, 72 N. C. 76, 89 (1875), Pearson, C. J., concurring, aptly compared the effect of a constitutional amendment on prior constitutional provisions and existing statutes to the effect of a codicil on a will or of a second deed on the original one.

[22] For cases concerning the effect of the Amendment and Volstead Act on prior federal legislation, see United States *v.* Windham, 264 Fed. 376 (1920); United States *v.* Sohm, 265 Fed. 910 (1920); United States *v.* One Essex Touring Automobile, 266 Fed. 138 (1920); United States *v.* Turner, 266 Fed. 248 (1920).

[1] Barker *v.* Hodgson, 3 M. & S. 267 (1814); Clifford *v.* Watts, L. R. 5 C. P. 578 (1870); Ashmore *v.* Cox, [1899] 1 Q. B. 436; Tweedie Trading Co. *v.* James P. Macdonald, 114 Fed. 985 (1902).

[2] Paradine *v.* Jane, Aleyn, 26 (1646). See also Dyer, 33 a. pl. 10.

[3] Taylor *v.* Caldwell, 3 B. & S. 826 (1863); Dexter *v.* Morton, 47 N. Y. 62 (1871); Ward *v.* Vance, 93 Pa. 499 (1880) (specified spring from which water was to be furnished); Clarksville Land Co. *v.* Harrison, 68 N. H. 374, 44 Atl. 527 (1896) (failure of stream down which logs were to be driven).